Supreme Court, U.S.
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No. 02-1073

In the

Supreme Court of the United States

WILHELMINA G. KING,

Petitioner,

v.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, and FRANK R. PETRUZIELO, Superintendent,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[Rephrased]

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS (AND THE DISTRICT COURT) ERRED IN CONCLUDING THAT THE ANNUAL LETTERS TO THE PLAINTIFF, WHICH WERE PERFORMED BY BOTH PARTIES, CONSTITUTED CONTRACTS UNDER FLORIDA LAW.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENTER A DEFAULT JUDGMENT AGAINST THE SCHOOL BOARD (AND, THUS, WHETHER THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE DISTRICT COURT'S ENTRY OF A LESSER SANCTION WAS WITHIN ITS DISCRETION) WHEN THE SCHOOL BOARD ULTIMATELY RESPONDED TO THE DISCOVERY REQUESTS.

III. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT IN ITS *DE NOVO* REVIEW) APPLIED THE IMPROPER STANDARD ON SUMMARY JUDGMENT.

IV. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT) IMPROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE OF SPOLIATION OF EVIDENCE.

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CITATIONS

None of the lower court decisions are officially reported. The United States District Court for the Southern District of Florida entered the following orders which are attached in the Petitioner's Appendix:

Appendix 5:	February 16, 2001 Report and Recommendation of Magistrate Judge Garber
Appendix 3:	July 19, 2001 Summary Final Judgment
Appendix 4:	September 12, 2001 Order Denying Plaintiff's Motion for Reconsideration

The order entered by the Eleventh Circuit Court of Appeals is also attached in the Petitioner's Appendix:

Appendix 1:	July 7, 2002 Order Affirming Final Summary Judgment
Appendix 2:	October 11, 2002 Order Denying Motion for Rehearing En Banc

BASIS FOR JURISDICTION

The district court's (United States District Court for the Southern District of Florida's) subject matter jurisdiction was pursuant to 28 U.S.C. §1343, 42 U.S.C. §2000e, et seq., and various constitutional provisions asserted by the Plaintiff/Petitioner, King.

The Eleventh Circuit's jurisdiction falls under 28 U.S.C. §1291, as the subject order was a final order

granting Final Summary Judgment in favor of the Defendants/Appellees, now Respondents, the School Board of Broward County and its former Superintendent, Frank R. Petruzielo, on all remaining counts against them.

This Court's discretionary jurisdiction is sought pursuant to Supreme Court Rule 10.

CONSTITUTION/STATUTORY AUTHORITIES

Those potentially applicable constitutional provisions and statutory authorities have been set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

After the dismissal of several complaints and causes of action (1R 15, 19, 36; 2R 37, 38, 44, 48, 51), this case proceeded on the following counts set forth in the Third Amended Complaint:

Counts I, II, III and X:	Racial Discrimination
Counts II and VII:	Violation of Due Process Rights
Counts IV and VII:	Violation of First Amendment
Counts V and VI:	Contractual Issues (Pendent State Claims)

(RE 39; 2R 39). During the pre-trial proceedings, both parties filed motions seeking to further the discovery process, including motions to compel the production of

records and/or responses to interrogatories, motions to compel appearance at depositions, and motions seeking the issuance of protective orders (2R 47, 68, 70, 75, 77; 3R 93, 94, 95, 100; 4R 104). After each of the three discovery hearings (6R; 7R; 8R), the magistrate judge granted some motions and denied others (RE; 3R 85, 86, 92, 119).

After the conclusion of written discovery and the pertinent depositions, the School Board and Superintendent Petruzielo filed their statement of undisputed facts and a joint motion for summary judgment as to all remaining counts against them (4R 126, 127, 134). The Plaintiff filed a response (4R 131, 132), and the School Board and Superintendent Petruzielo filed a brief reply (4R 134). The magistrate judge entered a thirty-one page report and recommendation which made detailed findings of fact and ultimately recommended that the district court grant the motion for summary judgment, in its entirety (RE; 4R 137; App. 5). After giving the Plaintiff appropriate time to file objections (4R 142), the district court adopted the report and recommendation, in toto, and entered final summary judgment (RE; 4R 144; App. 3). The Plaintiff's motion for reconsideration (4R 145; 5R 150) was denied (RE; 5R 153; App. 4), and an appeal ensued (5R 156). The Eleventh Circuit Court of Appeals affirmed the summary judgment on all counts (App. 1), the Plaintiff's motion for rehearing en banc was denied (App. 2), and the Plaintiff's motion to recall and stay the mandate was denied.

The facts of this case, as set forth in the magistrate judge's report and recommendation (App. 5; 4R 137), verbatim (with appropriate record citations inserted), are as follows: "Plaintiff, Wilhelmina G. King,

is an African-American female currently employed as an assistant principal by Defendant, the School Board of Broward County, Florida (hereinafter 'School Board'), at the Silver Ridge Elementary School. See Pl. Dep. at 5 [4R 127, Exh. A, p. 5]. Plaintiff has been employed by the School Board for more than three decades. Id. [4R 127, Exh. A, p. 5]. Prior to her current position, Plaintiff was employed as a principal by the School Board for the years 1988-1994 at the Robert C. Markham Elementary School. Id. at 6 [4R 127, Exh. A, p. 6]. She initially was an acting principal, then was promoted to interim principal and finally to full-time principal. Id. [4R 127, Exh. A, p. 6]. During her first year at Markham Elementary School, Plaintiff completed the Principal Internship Program. Id. at 28-29 [4R 127, Exh. A, pp. 28-29]. During her employment as principal at Markham Elementary School, Plaintiff was told that she was hired on an annual contract basis. Id. at 21 [4R 127, Exh. A, p. 21, Exh. B, D, F, G]. Additionally, Plaintiff received two evaluations during each year that she was a principal: a mid-year review and a final, end-of-year review. Id. at 26; see also Defs. Ex. C [4R 127, Exh. A, p. 26, Exh. C, E]. These evaluations reflected whether the evaluatee was 'Performing at a Professional Level,' or at a 'Needs Improvement in Professional Performance' level [4R 127, Exh. A, p. 26, Exh. C, E]. As further detailed below, Plaintiff received an overall evaluation of 'Needs Improvement' on her 1992-1993 mid-year report [4R 127, Exh. C]. She then received overall evaluations of 'Performing at a Professional Level' for the end-of-year report for 1992-1993 and for the mid-year report of 1993-1994 [4R 127, Exh. C]. Subsequently, Plaintiff received a 'Needs Improvement' overall evaluation for her end-of-year report for 1993-1994. See Defs. Ex. C [4R 127, Exh. C].

By the spring of 1994, Plaintiff states 'that she might have been on the verge of being burned out.' Pl.'s Dep. at 91-92 [4R 127, Exh. A, pp. 91-92]. She decided that she 'want[ed] to take a hiatus away,' and informed the Area Superintendent that she would like to do something different that was still in line with her work as a principal. Id. at 91 [4R 127, Exh. A, p. 91]. Plaintiff was asked if she wished to become involved with the Chapter One Parent Involvement Program, and she voluntarily agreed to be assigned as a principal on task assignment for the 1994-1995 school year. Id. at 93-94 [4R 127, Exh. A, pp. 93-94]. She states that she was 'delighted with the idea.' Id. [4R 127, Exh. A, pp. 93-94]. While with the Chapter One Program, Plaintiff received a mid-year and a final evaluation. See Defs. Ex. E. [4R 127, Exh. E]. In both, she received an overall evaluation of 'Performing at a Professional Level.' [4R 127, Exh. E]. Said evaluations, however, did note a number of areas in which Plaintiff needed improvement. See Pl.'s Dep. at 95-102. [4R 127, Exh. A, pp. 95-102].

In early 1995, Plaintiff discovered that her position with the Chapter One Program would not be available for the subsequent school year, apparently due to downsizing. See Pl.'s Dep. at 93-94 [4R 127, Exh. A, pp. 93-94]. Sometime in May of 1995, Plaintiff was informed that she had been assigned to the position of assistant principal. Id. at 116; see also Defs. Ex. F [4R 127, Exh. A, p. 116, Exh. E]. A letter from the School Board to Plaintiff, dated June 23, 1995, indicates that she was placed as an assistant principal at the Silver Ridge Elementary School for the school year 1995-1996, effective August 1995. See Defs. Ex. G [4R 127].

Plaintiff reported to Silver Ridge Elementary School as an assistant principal in the fall of 1995, for

the 1995-1996 school year [4R 127, Exh. A, pp. 143-144]. She also met twice with Defendant Frank Petruzielo, then the Superintendent of the Broward County School Board, in September and October of 1995 to discuss her demotion to assistant principal. See Pl. Dep. at 147-48 [4R 127, Exh. A, pp. 147-148]. Plaintiff asserts that Petruzielo 'assured' her that if she received a positive evaluation at Silver Ridge she would receive a principalship. Id. at 149 [4R 127, Exh. A, p. 149]. Defendant Petruzielo also advised Plaintiff that he would speak to various colleagues and administrators in order to investigate the demotion. Id. [4R 127, Exh. A, p. 149, Exh. H, #9; 4R 135]. In a letter to Defendant Petruzielo, dated April 15, 1996, Plaintiff wrote that she hoped he would consider her request to be placed as a principal. See Defs. Ex. I [4R 127]. Plaintiff also applied for a position as principal at Silver Ridge Elementary School on or about April 15, 1996. See Third Am. Compl. ¶25 [RE; 2R 39, ¶25]. She did not receive the promotion.

After receiving a positive 'Performing at a Professional Level' evaluation for her work as assistant principal during the school year of 1995-1996, Plaintiff was reassigned to Silver Ridge Elementary School as an assistant principal for the following year [4R 127, Exh. A, pp. 159-160]. Her salary, which had been protected at the principal's rate for the 1995-1996 school year, was reduced to that of an assistant principal. See Pl.'s Dep. at 159; Third Am. Compl. ¶35 [2R 39, ¶35; 4R 127, Exh. A, pp. 159-160].

Between 1995 and the present, Plaintiff has applied for at least eleven principal positions. See Pl.'s Dep. at 171, 181; Third Am. Compl. ¶26 [2R 39, ¶26; 4R 127, Exh. A, pp. 171, 181]. Plaintiff asserts that

sometime in the summer of 1997, Mark Seigle, the Associate Superintendent for Personnel, telephoned her and advised her that he had spoken with Defendant Petruzielo and that Defendant Petruzielo had asked him to contact her to tell her that she should apply for open principal positions. See Pl.'s Dep. at 173 [4R 127, Exh. A, p. 173]. Plaintiff apparently received two or three interviews before area directors and their designees in response to her applications for a principal position. Id. at 181 [4R 127, Exh. A, p. 181]. To date, Plaintiff has not been selected for a principal position.

Plaintiff subsequently filed a complaint with the Equal Employment Opportunity Commission ('EEOC'), alleging that she had been demoted without notification, and that she had applied for various principalships since 1995, but had not been selected because of her race. See Pl.'s Dep. at 169 [4R 127, Exh. A, pp. 168-169]. She asserts that her unsuccessful application for a principalship at Plantation Elementary School prompted the filing of the complaint. See id. at 172-173 [4R 127, Exh. A, pp. 172-173]. In November, 1998, Plaintiff received her Right to Sue notice from the EEOC. See Third Am. Compl. ¶45 [2R 39, ¶45].

[(Paraphrased) After receiving the Right to Sue letter, the Plaintiff filed this action against the School Board and Superintendent Petruzielo. After several complaints were dismissed (1R 6, 7, 15, 17, 18, 19, 22, 23, 24, 25, 28, 30, 35; 2R 37, 39), the Plaintiff's Third Amended Complaint was filed (2R 39). The Court dismissed three counts and the case proceeded on the following actions (2R 43, 48).]

"In Counts I, II, III and X, the Plaintiff asserted that the Defendants, the School Board and

Superintendent Petruzielo, violated her constitutional rights under 42 U.S.C. §1981, 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., in demoting her from a principal position and in failing to reinstate her to principalship status (RE; 1R 39; 4R 137, p. 5).

In Counts II and VII, the Plaintiff asserted that the Defendants violated her Fourteenth Amendment right to due process and her rights under 42 U.S.C. §1981 and 42 U.S.C. §1983 through their alleged failure to reinstate her to the position of principal (RE; 1R 39; 4R 137, p. 5).

In Counts IV and VII, the Plaintiff asserted First Amendment violations by the Defendants, in the reduction of her pay and status to that of an assistant principal (RE; 1R 39; 4R 137, p. 5).

In Count V, the Plaintiff asserted that Defendant Petruzielo tortiously breached a verbal contract in failing to restore her to a principal position.

In Count VI (denoted as Count IV in the Third Amended Complaint), the Plaintiff asserted that she detrimentally relied on a statement by Defendant Petruzielo, and suffered damages as a result (RE; 1R 39; 4R 137, p. 5)." [*End of verbatim recitation of report and recommendation* (App. 5; 4R 137.)]

Because the Plaintiff's Petition for Writ of Certiorari primarily focuses on the discovery proceedings in this case, an overview of those proceedings, from the commencement of the case, should provide this Court with a better understanding of the magistrate judge's rulings.

The Plaintiff filed her very *first* motion to compel shortly after counsel for the School Board and Superintendent Petruzielo had been substituted (2R 29, 32, 47). That very first motion sought a default and/or other sanctions under Fed. R. Civ. P. 37 (despite the fact that the responsive pleadings had not even been filed) (2R 47, 53, 54). That motion was never received by the newly substituted (undersigned) counsel and as such, no response was filed[1] (2R 47). Having not received a response from the School Board, the magistrate judge entered an order granting in part and denying in part the motion to compel (compelling the School Board to respond to the discovery) and granting in part and denying in part the motion for sanctions (awarding the Plaintiff fees and costs for bringing the motion to compel) (2R 57).

Immediately upon receipt of that order, the School Board filed a motion opposing the award of attorneys' fees, suggesting that it had previously, and substantively, responded to the Plaintiff's discovery requests (2R 61). Although some of the discovery responses had been late, the School Board argued that, absent any willful or intentional failure to comply with discovery or any contumacious conduct, the district court should have denied any sanctions (2R 61).

The magistrate judge then scheduled the first discovery hearing (6R). Following that hearing, at which the magistrate judge had the benefit of argument by

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[1] The "certificate of service" on the motion states that it was "delivered to Defendants" but does not provide a name or address for counsel to whom the motion was forwarded. Undersigned counsel never received the motion nor the Plaintiff's notice to the court that her motion had not been ruled upon.

both counsel, a new order was entered which ordered the School Board to respond to all outstanding discovery, vacated the prior order (awarding sanctions), and ordered the School Board to reimburse the Plaintiff for all costs incidental to Plaintiff's counsel's travel to attend the hearing in Miami (RE; 2R 69). The Plaintiff's trial and appellate counsel, who is also her daughter, appeared *pro hac vice* from Dallas, Texas. The trial court did not award fees to Plaintiff's counsel, or other sanctions, based on a finding that both parties acknowledged that the discovery problems resulted from a lack of communication (6R, p. 10).

The Plaintiff's discovery requested, among other things, the entire personnel files of all of the Plaintiff's supervisors and the personnel files of each principal appointed to a position for which the Plaintiff had applied (43R 143, Exh. A). Because of a delay in obtaining the personnel files, and in *creating documents which did not otherwise exist*, the School Board's counsel contacted Plaintiff's counsel, before the expiration of the discovery deadline imposed by the court, and notified her that an extension was needed. (2R 77, pp. 2-3; 4R 120, Exh. 1). Plaintiff's counsel agreed to the extension (7R, p. 3), and counsel for the School Board deemed it unnecessary to file a motion seeking an extension of time in which to respond (2R 77, p. 3). Notwithstanding that agreement, the Plaintiff filed a second motion to compel discovery, again seeking the entry of sanctions (2R 75).

The School Board promptly responded (2R 77), advising the Court of the communications between counsel and, further, that the School Board was still in the process of copying and redacting some of those personnel files (to protect social security information,

retirement account information, beneficiary information, and the like), but informed that court that it had otherwise complied with all of the Plaintiff's discovery requests (2R 77, p. 5). In an abundance of caution, the School Board simultaneously filed a motion for an extension of time in which to produce those personnel files (2R 80). Again, the School Board suggested that the Plaintiff's request for the entry of judgment by default was an extraordinarily harsh sanction that was not justified under the circumstances, since its conduct had not been intentional, nor had it been designed to delay the litigation of the case (2R 77, pp. 3, 5).

Following a second hearing on these discovery issues (7R), the magistrate judge entered an order compelling the parties to "meet and confer" regarding outstanding discovery disputes, allowed the School Board ten (10) additional days in which to provide the responses that had been uncontrollably delayed, and ordered the School Board to pay the Plaintiff's counsel's costs for attending the hearing in Miami (3R 86; 7R, p. 3). The court deferred ruling on an award of attorney's fees or other sanctions (7R, p. 11).

Subsequently, the School Board notified the court of its compliance, i.e., that it had served its "final" responses to the Plaintiff's discovery requests (3R 87). Simultaneously therewith, the School Board sought (3R 88), and the court granted (3R 92), one additional week in which to produce redacted copies of certain personnel files that had not yet been copied due to their voluminous nature. (In total, the School Board produced approximately twenty (20) personnel files, including some particularly voluminous files of employees that had been with the School Board for

decades (2R 77)).

The Plaintiff then filed a "notice of noncompliance" suggesting that the School Board had not provided "complete" responses to her discovery requests (3R 93). Once again, the School Board responded, arguing that it had "fully" complied with the discovery requests, while particularly mindful that it remained subject to an award of sanctions (3R 100; 7R p. 11). The School Board's response went through each discovery request, and corresponding response, and reluctantly sought the court's assistance with what it deemed a difference of opinion as to the sufficiency of the discovery responses (3R 100, p. 2). The School Board also sought a hearing or status conference on this and other outstanding discovery matters, including the School Board's motion to compel better answers to its discovery and the Plaintiff's refusal to appear for a deposition despite a looming discovery cut-off (3R 94, 95 96, 99).

At a third, and final, discovery hearing (8R), counsel for the Defendants sought the court's intervention regarding discovery (8R, pp. 4, 6). The magistrate judge compelled the Plaintiff to provide better answers to discovery and ordered the Plaintiff to appear for her deposition (then scheduled for the sixth time) (4R 119; 8R, pp. 22-23). The court then ordered the School Board to produce documents "to the extent that they had not already been produced" (4R 119; 8R, pp. 24-26). No sanctions were awarded to either party. Several days later, the School Board notified the court that it had complied with the order by producing documents that *had been previously produced* (with the exception of certain School Board minutes that, due to a ministerial error, had previously been produced with

copies of only one side of the two-sided pages) (4R 120; 8R, pp. 19, 23-24).

No further discovery motions were filed with the court, no sanctions were awarded, and the parties proceeded with the pertinent depositions. After taking those depositions, and in accordance with the time frame set forth by the court (4R 123), the School Board and Superintendent Petruzielo filed their joint statement of undisputed material facts and joint motion for summary judgment as to all remaining claims (4R 126, 127). Following the Plaintiff's response (4R 131) and the School Board and Superintendent Petruzielo's reply (4R 134), the magistrate judge entered a thirty-one page report and recommendation which recommended that the court grant the motion for summary judgment (App. 5; 4R 137).

After the Plaintiff filed her objections to the magistrate judge's report and recommendation (4R 142) and the School Board and Dr. Petruzielo were provided with an opportunity to briefly reply (4R 143), the district court entered final summary judgment in favor of the School Board and Superintendent Petruzielo adopting, in its entirety, the report and recommendations (App. 3; 4R 144). After the Plaintiff's motion for reconsideration (4R 145) was responded to by the School Board and Superintendent Petruzielo (4R 150), it was denied by the court (App. 4; 5R 153). The School Board and Superintendent Petruzielo's motions for attorneys' fees and costs (5R 146 -149) were denied without prejudice to being re-submitted after the appeal process concluded (5R 157). On appeal, The Eleventh Circuit affirmed the district court's decision holding: (1) a spoliation instruction was not warranted, (2) Plaintiff's discrimination claims were properly dismissed on

summary judgment; (3) the district court did not err in refusing to grant the extreme measure of default judgment; (4) there was no evidence of spoliation; and (5) Plaintiff's due process claim was properly dismissed. (App. 1). The Plaintiff's motion for rehearing and motion to recall and stay the mandate were denied (App. 2).

SUMMARY OF THE ARGUMENT

This is a factually unique lawsuit that does not compel this Court's discretionary jurisdiction. The decisions of the Southern District of Florida and the Eleventh Circuit Court of Appeal do not conflict with the decisions of any other courts of appeals or this Court; they do not address "important federal questions," and, thus, do not require any settlement by this Court. In essence, the Plaintiff/Petitioner seeks review of decisions based on a unique set of facts (those giving rise to the underlying complaint, and those regarding the alleged discovery violations), on issues that were entirely within the discretion of the district court and/or decisions based on the alleged misapplication of Florida law. As such, this Court should deny the Petition for Writ of Certiorari.

Each of the questions presented to this Court has been raised, and adequately addressed below. First, the district court and the Eleventh Circuit Court of Appeals properly concluded, under *Florida* law, that the Plaintiff was employed under an annual contract with the School Board at all times material hereto. The Plaintiff's assertions to the contrary, some of which are raised for the first time here, are simply misplaced and, even if accurate, do not warrant this Court's involvement where

they address the application of *Florida* law to a *Florida* statute.

Second, the Plaintiff takes issue with the district court's refusal to enter a default judgment against the School Board. Not only was that determination *entirely* discretionary on the part of the district court but, as recognized by the Eleventh Circuit, such a drastic sanction was not warranted under the circumstances where the School Board did ultimately respond to the discovery requests.

Third, the Plaintiff asserts that the district court improperly applied the summary judgment standard as, apparently, did the Eleventh Circuit in its *de novo* review. This contention hardly warrants a response, much less this Court's involvement. Nevertheless, both the district court and the Eleventh Circuit properly concluded that the Plaintiff failed to present any material questions of fact sufficient to withstand the summary judgment challenges.

Fourth, and finally, the Petitioner contends that the district court inappropriately granted summary judgment despite a pending claim for spoliation. Contrary to the Petitioner's assertion, however, both the district court and the circuit court concluded that there was no evidence of spoliation of evidence, that a spoliation instruction was not warranted, and that summary judgment was appropriately awarded.

ARGUMENT

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS (AND THE DISTRICT COURT) ERRED IN CONCLUDING THAT THE ANNUAL LETTERS TO THE PLAINTIFF, WHICH WERE PERFORMED BY BOTH PARTIES, CONSTITUTED CONTRACTS UNDER FLORIDA LAW.

Though the magistrate judge, the district court and the circuit court have all disagreed, as a matter of law, the Plaintiff continues to assert that she was employed under a continuing contract. In turn, the Plaintiff asserts, she has not been provided the due process to which she is entitled.

This is, at its crux, a question of Florida law with which this Court need not concern itself. Nevertheless, on the merits, the Plaintiff was, indeed, provided with all of the due process to which she is, or was, entitled, and the district and circuit courts appropriately concluded that she was employed under an annual contract.

The success of a due process argument depends on the finding of a constitutionally-protected property interest in the expectation of continued employment, or of a liberty interest having been infringed upon by the state. Absent such interest, no due process protections attach. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). A property interest is generally created out of a state statute or an individual contract, not an abstract need or desire for it or a unilateral expectation of it. Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537 (11th Cir. 1989).

Despite her continuing suggestions to the contrary, the Plaintiff was an administrator employed under annual contracts with the School Board, all of which were performed by both parties. As such, the Plaintiff, had no claim to a due process violation, as she had no valid property interest in, or right to, continued employment with the School Board.

As explained by Superintendent Petruzielo, *all* school-based and district administrators within the School Board of Broward County are employed subject to annual contracts (4R 143, Exh. E, pp. 14-17). The district and circuit courts properly concluded that there was no question of fact as to this issue based on: (a) the annual letters/contracts themselves, which were all attached to the motion for summary judgment, (b) the Plaintiff's own testimony that she had been told that, as an administrator, she was subject to an annual contract, and (c) the fact that the Plaintiff, and the School Board, had performed each of those contracts to conclusion, (4R 127, Exh. A , pp. 21-24, 117, 248-249, Exh. B, D, F and G).

The annual contracts (letters) attached to the summary judgment are indeed contracts, as a matter of law, that comply with the requirements of Florida law. As found in Jones v. Miami-Dade County Public Schools, 816 So. 2d 824 (Fla. 3d DCA 2002), a teacher's continuing contract status does not automatically follow him or her when subsequently promoted to an administrative position; upon promotion, the former teacher, now administrator, must earn continuing contract status in that position.[2]

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[2] The "continuing" contract on which the Plaintiff continually relies is a "Continuing Contract for *Instructional Personnel*" entered into by the parties in 1973, which governed the

The letters provided to the Plaintiff met all requirements of Florida law, and constituted enforceable annual contracts which, incidentally, both parties performed to conclusion. *See*, §231.26, Fla. Stat. (requiring only "written" contract, without other specifications); Vienneau v. Metro. Life Ins. Co., 548 So. 2d 856, 859 (Fla. 4th DCA 1989) (construction of employment contract, presents a question of law for the court, if its language is clear and unambiguous); Story v. Culverhouse, 727 So. 2d 1128, 1130 (Fla. 2d DCA 1998)(letter providing salary, calendar, and duration of agreement was unambiguous, valid, enforceable, employment agreement).

As an employee under an annual contract, the Plaintiff had no expectation to continued employment as a principal, pursuant to Florida law, any contract, or by any "de facto"[3] tenure. A school employee serving under an annual contract, like the Plaintiff, is not entitled to an administrative hearing unless the employee is discharged prior to the expiration of the

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Plaintiff's employment as a teacher (i.e., instructional personnel) within the School Board. As stated by Superintendent Petruzielo, and acknowledged by the Plaintiff, *all* administrative personnel within the School Board are employed pursuant to *annual* contracts. Per Jones, *supra*, that contract did not automatically follow the Plaintiff and become applicable to her as an administrator.

[3] In Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court acknowledged that a professor might obtain de facto tenure even though tenure had never been formally conferred. However, the School Board contends that there are no facts in this case to warrant such a contention. *See, e.g.*, Gray v. Bd. of Regents of the Univ. Sys. of Georgia, 150 F.3d 1347 (11th Cir. 1998); Schneider, 875 F.2d at 1544-1545. *See also*, Sch. Bd. of Leon County v. Goodson, 335 So. 2d 308 (Fla. 1st DCA 1976).

contract or if the employee can assert a constitutionally impermissible reason for the discharge. *See* Jones, 816 So. 2d at 826. *See also*, Thaw v. Bd. of Pub. Instruction of Dade County, 432 F. 2d 98, 100 (5th Cir. 1970); Nelson v. Sch. Bd. of Palm Beach County, Florida, 738 F. Supp. 478 (S.D.Fla. 1990); Fertally v. Miami-Dade Community College, 651 So. 2d 1283, 1284 (Fla. 3d DCA 1995). *See also*, Fla. Admin. Code r. 6A-1.0691. Because the plaintiff had no expectancy of employment beyond the contract period, the decision not to enter into a new annual contract, or to offer a revised contract, is not reviewable. *See* Fertally, 651 So. 2d at 1285. *See also*, Sullivan v. Sch. Bd. of Pinellas County, 773 F.2d 1182, 1185 (11th Cir. 1985)(assistant superintendent, as non-tenured employee of school district, had neither protected property interest nor protected liberty interest in continued employment and, absent such, "was not entitled to any process at all"), *citing*, Roth, 408 U.S. at 564; Brew v. Sch. Bd. of Orange County, Florida, 626 F. Supp. 709, 713-714 (M.D.Fla. 1985)(school board employee with valid fixed-term contract had no property interest in continued employment and could not challenge non-renewal of her contract), *aff'd*, 802 F.2d 1397 (11th Cir. 1986); Sherrod v. Palm Beach County Sch. Bd., 620 F. Supp. 1275, 1276 (S.D.Fla. 1985)(plaintiff's "mere expectation" that a continuing contract would be offered is insufficient to create a constitutionally protected right), *aff'd*, 792 F.2d 1125 (11th Cir. 1986); Sickon v. Sch. Bd. of Alachua County, Florida, 719 So. 2d 360 (Fla. 1st DCA 1998)(denial of administrative hearing upheld where school teacher had no property interest in maintaining position as band director).

Like the employees in the above-mentioned cases, the Plaintiff here, who acknowledged that she

was employed under annual contracts during her tenure as an administrator within the School Board, (1) was not employed under a continuing contract as an administrator; (2) was not dismissed (or demoted) during the term of an annual contract; (3) was provided with notice, year after year, of her performance deficiencies; (4) was demoted at the conclusion of an annual contract; (4) never sought a formal administrative review or hearing; and (5) never asserted that she was demoted for constitutionally-impermissible reasons until she filed a notice with the EEOC more than three years after her purported demotion.

As such, both the School Board and Superintendent Petruzielo were appropriately awarded summary judgment as to the Plaintiff's due process claims based on a determination that the Plaintiff was employed under annual contracts. The summary judgment on the due process issue is further supported by the Plaintiff's own testimony that she voluntarily chose not to seek an administrative hearing concerning her demotion (4R 137, pp. 26-27).

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENTER A DEFAULT JUDGMENT AGAINST THE SCHOOL BOARD (AND, THUS, WHETHER THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE DISTRICT COURT'S ENTRY OF A LESSER SANCTION WAS WITHIN ITS DISCRETION) WHEN THE SCHOOL BOARD ULTIMATELY RESPONDED TO THE DISCOVERY REQUESTS.

A district court has the utmost discretion in ruling on discovery proceedings. *See e.g.*, Burger King Corp. v. C.R. Weaver, 169 F.3d 1310 (11th Cir. 1999). To reverse the district court, the court of appeals must be left with "definite and firm conviction that the court below committed error of judgment." *See* BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045 (11th Cir. 1994). Here, the circuit court concluded, quite to the contrary, that the district court acted well within its discretion in refusing to enter such a drastic sanction. These determinations, on an issue solely within the discretion of the trial court, do not warrant or require this Court's involvement. Nevertheless, the School Board and Dr. Petruzielo offer the following brief argument as to the merits of this issue.

In the present case, there were, undoubtedly, problems with discovery attributable to *all* of the parties. Due to these problems, and differences in opinion with regard to whether discovery responses were complete and/or sufficient, the magistrate judge took a more-active-than-usual role in the discovery process.

Despite the Plaintiff's attempts to castigate the Defendants from the very beginning of this lawsuit (before their responsive pleadings were even filed), there is absolutely no evidence in this record that the School Board's conduct constituted flagrant disregard or willful disobedience as suggested. The School Board provided the court with an explanation of the circumstances giving rise to the discovery issues in this case, including confusion created by the Plaintiff's attachment of an improper exhibit, the unavoidable delay incurred in copying extensive, voluminous personnel files (and redacting those personnel files), and in creating documents that did not otherwise exist in any form, in order to adequately respond to the Plaintiff's discovery requests. The School Board (and Superintendent Petruzielo) steadfastly maintain, as they did before the magistrate judge, the district court and the circuit court, that they complied with all discovery requests. It is quite telling that the magistrate judge, who oversaw the discovery process here, never concluded that these Defendants should be responsible for the Plaintiff's attorney's fees, much less that a dismissal of their defenses or a default judgment was warranted.

Once again, the Plaintiff fails to submit anything, other than conclusory allegations, to support any claim that the magistrate judge and/or district court abused their discretion during the discovery proceedings. The cases cited by the Plaintiff, which uphold the entry of default for discovery violations, are inapplicable. They do not support her contention that the trial court erred in *refusing* to grant such sanctions under the facts of this case. Further, as implicitly suggested by the circuit court, it might have been an abuse of discretion for the district court to have entered a default when "less

draconian but equally efficient sanctions" were available. App. 1, *citing*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997).

III. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT IN ITS *DE NOVO* REVIEW) APPLIED THE IMPROPER STANDARD ON SUMMARY JUDGMENT.

The Plaintiff's suggestion that the magistrate judge, the district court, and the circuit court applied the improper standard on summary judgment is completely misplaced and does not warrant review by this Court. The entire rationale underlying the Plaintiff's argument on this point is inaccurate; throughout this case, the Plaintiff has taken the improper legal position that the School Board and Superintendent Petruzielo, as the Defendants in the lawsuit, have the burden of "disproving" her theories in order to succeed on summary judgment. While the School Board and Superintendent Petruzielo acknowledge that, on summary judgment, the court is to view the facts in the light most favorable to the non-moving party, they nonetheless contend that it is the Plaintiff who bears the burden of establishing that the Defendants intentionally discriminated against her, a fact the Plaintiff seems to overlook. *See, e.g.*, Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1375 (11th Cir. 1996); Richardson v. Leeds Police Dep't, 71 F.3d 801, 805 (11th Cir. 1995). It is the Plaintiff who must establish a prima facie case of discrimination, Pearson v. Macon-Bibb County Hosp., 952 F.2d 1274, 1281 (11th Cir. 1992) and who, ultimately, must prove by a preponderance of the evidence that the Defendants "acted with discriminatory intent." *See, e.g.*, Richardson, 71 F.3d at 805. As found by the district court and the circuit court, for the reasons set forth in

their opinions, the Plaintiff failed to meet this burden. *See* App. 1-5.

IV. WHETHER THE DISTRICT COURT (AND THE ELEVENTH CIRCUIT) IMPROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE OF SPOLIATION OF EVIDENCE.

Once again, the Plaintiff asks this Court to accept jurisdiction to address a question that was entirely within the discretion of the trial court, i.e., whether there was evidence of spoliation in this case. The district and circuit courts readily agreed that the record was devoid of any evidence of spoliation, and that the doctrine was wholly inapplicable to this case. The Plaintiff does not contend that the district court or the circuit court improperly applied the law, and there is no need for this Court to address the issue.

Substantively, the record in this case does not reflect that the School Board or Superintendent Petruzielo altered or destroyed evidence As such, the doctrine of spoliation of evidence is wholly inapplicable here.

First, the Florida courts only apply spoliation inferences to cases involving the "destruction" of evidence. *See generally*, Florida Evergreen Foliage v. E.I. DuPont de Nemours and Co., 165 F. Supp. 2d 1345, 1359 (S.D.Fla. 2001)(further recognizing that Plaintiff must be unable to prove her underlying action without the evidence). Second, Eleventh Circuit precedent clearly imposes a requirement of bad faith for the imposition of sanctions in connection with the destruction of evidence. Banco Latino, S.A.C.A. v.

Lopez, 53 F. Supp. 2d 1273, 1277 (S.D.Fla. 1999). During the litigation, the Plaintiff's counsel conceded that she had no knowledge of spoliation (3R 93, p. 30). Absent any evidence of alleged destruction or "unexplained disappearance of crucial evidence," the doctrine of spoliation was wholly inapplicable and the district court (and circuit court, in turn), did not abuse any discretion in failing to apply that doctrine to the facts of this case. Moghari v. Anthony Abraham Chevrolet, 699 So. 2d 278, 279 (Fla. 3d DCA 1997).

CONCLUSION

Wherefore, the Respondents, THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA and its former Superintendent, FRANK R. PETRUZIELO, respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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